Order Re: Requests For Admissions 06/05/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, _____	MDL NO. 1407 ORDER RE: REQUESTS FOR ADMISSIONS
This document relates to all actions	

I. INTRODUCTION

THIS MATTER comes before the court on Defendants' Motion and Memorandum in Support of Motion for Protective Order [Requests for Admissions] ("Defs' Mot.") and Plaintiffs' Consolidated Memorandum in Opposition to MDL Defendants' Motion for Protective Order and in Support of MDL Plaintiffs' Motion to Compel Responses to Pending Rule 36 Requests ("Pls' Opp. and Mot. to Compel"). Having reviewed pleadings filed in support of and in opposition to the motions, along with the remainder of the record, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

Plaintiffs' Lead Counsel in the MDL proceedings served Requests for Admissions ("requests") on four MDL defendants, including: Wyeth (f/k/a American Home Products Corporation); Novartis Consumer Heath, Inc. ("NCH"); Bayer Corporation ("Bayer"); and Consumer Healthcare Products Association ("CHPA"). The requests attached a form identifying documents by bates number and asked defendants to admit, as to each document, that:

1. the document (a) is a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge; (b) was kept in the course of a regularly conducted business activity; and (c) that it was the regular practice of defendant's business activity to make the memorandum, report, record or data compilation; and

2. the respective defendant, through its employees, had knowledge of the contents of each document at or near the time it was created or received by defendant.1 1 Plaintiffs indicate that they offered substitute language for this second request, as follows:

> The respective defendant, by and through any one of its employees (past or present) with managerial/supervisory responsibilities or who otherwise had/have the authority to bind the defendant, had knowledge of the contents of each

> such document at or near the time it was created or received by defendant.

Pls' Opp. and Mot. to Compel, at 8.

See Pl's Opp. and Mot. to Compel, at 7.

In total, plaintiffs requested admissions with respect to 1140 documents produced by Wyeth, 1808 documents produced by NCH, 375 documents produced by Bayer, and hundreds of documents produced by CHPA.[2] The documents selected for inclusion in the requests came from defendants' production of documents, including more than 1,300,000 documents from Wyeth, more than 1,000,000 documents from NCH, more than 240,000 documents from Bayer, and an unspecified number of documents produced by CHPA. The requests do not include any reference to recently produced electronic data documents, which plaintiffs indicate will likely yield additional, albeit a much smaller number of, requests.

III. ANALYSIS

Federal Rule of Civil Procedure 36 governs requests for admissions:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements of opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

Fed. R. Civ. P. 36(a). Rule 26(b)(1) permits "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things . . . ."

A party responding to a Rule 36 request may admit, deny, object, explain why the matter cannot be admitted or denied, or provide a sufficient statement as to lack of information or knowledge. Id.[3] A party may also do nothing whatsoever in response to a request, thus constituting an admission, request an extension of time, or, as defendants did here, move for a protective order. An answer must "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." Id.

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the

party to admit or deny.

Id.

A. Defendants' Motion for Protective Order

Defendants seek a protective order pursuant to Federal Rule of Civil Procedure 26(c), arguing that the requests for admission are oppressive and unduly burdensome. Under Rule 26(c), "[u]pon a motion by a party . . . from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense[.]"

In support of their motion, defendants point to the volume and compound nature of the requests, and decisions in which courts have granted protective orders based on an excessive number of requests for admissions. See, e.g., Misco, Inc. v. Mid-South Aluminum Co., 784 F.2d 198 (6th Cir. 1986) (2028 requests); Leonard v. University of Del., No. 96-360 MMS, 1997 U.S. Dist. LEXIS 4196 (D. Del. 1997) (839 requests); Wigler v. Electronic Data Sys. Corp., 108 F.R.D. 204 (D. Md. 1985) (1664 requests). Defendants describe the requests as a premature over-designation of documents intended for use at trial, and as an attempt to impermissibly shift the evidentiary burden of establishing the foundational requirements for admission under the business records exception onto defendants.

Defendants request that the court determine a reasonable number of total requests for admissions allowable in this case and point to federal district and state court limitations as preferable examples. They also ask that the court permit sixty days for response to a revised number of requests, given the complexity and scope of the type of requests at issue.

Plaintiffs reject the assertion that the requests are oppressive or burdensome, and argue that defendants fail to meet their burden of establishing the need for a protective order. Plaintiffs confirm that the requests lay the foundation for each document's admission into evidence as a trial exhibit in any case in which a plaintiff chooses to utilize the MDL Plaintiffs' Steering Committee's work product. They point out that they seek admissions with respect to only a small portion of the documents produced by defendants,44 By plaintiffs' calculation, the documents identified in the requests account for less than one percent of the total number of documents produced by these defendants. Plaintiffs also point out that all of the documents at issue have already been reviewed and coded in electronic databases by defendants. the need for an extensive number of trial exhibits given the volume and complexity of these cases, and the inevitable hearsay objections to the introduction of these documents as exhibits in the eventual multitude of individual trials. Plaintiffs distinguish the cases cited by defendants as involving single party claims of unquestionably greater simplicity than this MDL. In contrast, plaintiffs point to cases in which courts have permitted over 100 and close to 300 requests for admissions, in non-MDL lawsuits, including cases in which

the requests for admission sought to lay the foundation for trial exhibits. See, e.g., Berry v. Federated Mutual Ins. Co., 110 F.R.D. 441, 443 (N.D. Ind. 1986) (allowing use of Rule 36 requests to establish the authenticity of 244 documents for use at trial); Shawmut v. American Viscose Corp., et al., 12 F. R.D. 488, 489 (D. Mass. 1985) (allowing 106 requests to establish genuineness of documents for use at trial). Plaintiffs reject the usefulness of federal district and state court limitations on requests for admissions, noting that neither the federal rules nor the local rules for the Western District of Washington contain such limitations, and arguing that those rules were never intended to apply to an MDL.

Plaintiffs assert that, given their previous experiences with these types of cases, they cannot sit back and hope that defendants will stipulate to the admission of these documents at the eventual trials. They further assert that the restrictions on depositions, as well as the lack of cooperation by deponents,[5] As an example, plaintiffs point to the deposition of a former NCH employee, Greg Torre, conducted on April 29, 2002. A review of an excerpt from this deposition confirms that Torre declined to review documents provided to his attorneys prior to the deposition and, during the deposition, did not confirm that he authored or originated at least some documents which included his signature or initials. See Pls' Opp. and Mot. to Compel, Ex. A. make the laying of foundation for documents in depositions an inefficient, impractical, and unattainable option in this case. Finally, plaintiffs reject defendants' description of the requests as premature, noting the fact that, pursuant to MDL discovery deadlines, only slightly more than seven months exist in which to establish the facts necessary for the admission of the specified documents.

1. Plaintiffs' First Request for Admission:

Plaintiffs' first request seeks identification of the documents at issue as subject to the business records exception to the hearsay rule. See Fed. R. Evid. 803(6). Application of the business records exception requires that the proponent of a document establish that: "(1) it is made or based on information transmitted by a person with knowledge at or near the time of the transaction; (2) in the ordinary course of business; and (3) is trustworthy, with neither the source of information nor method or circumstances of preparation indicating a lack of trustworthiness." Monotype Corp. v. International Typeface Corp., 43 F.3d 443, 450 & n.6 (9th Cir. 1994) (citing United States v. Bonallo, 858 F.2d 1427, 1435 (9th Cir. 1988)).

Defendants break down the business records exception into individual components - such as whether a document was made "at or near the time of the transaction" and was prepared by a "person with knowledge - and assert that a determination of a document's satisfaction of each component requires a case-by-case determination of the facts and application of those facts to the law. Defendants point to the complexity of this determination given the number of current and former employees at issue with respect to these documents, the vast span of time covered by the documents,[6] Defendants note that the

documents span a thirty to forty year period of time. the existence of documents not containing readily ascertainable information as to the document creator, and the existence of documents created by outside individuals or companies.

Plaintiffs assert the propriety of this request. In support of this assertion, they note the fact that Rule 36 exists to expedite trials by resolving issues which are not disputed. See, e.g., Berry, 110 F.R.D. at 442; Charles Alan Wright and Arthur R. Miller, 8 Federal Practice and Procedure § 2252 (2d ed. 1994) ("The rule is intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry.")

Plaintiffs also support the volume of documents at issue. They point to the role of the Plaintiffs' Steering Committee, in conducting discovery of common issues on behalf of every PPA case filed in federal court. Plaintiffs argue that the requests are, in fact, proportionate to the nature of this case.[7] [7] See, e.g., Fed. R. Civ. P. 26(b) advisory committee's note (envisioning consideration as to whether discovery "is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms.") Further, they cite cases in support of the proposition that neither the number of requests alone, nor the inconvenience and expense imposed, constitute sufficient reason for disallowing requests for admission. See, e.g., Duncan, et al. v. Santaniello, et al., No. 94-30224-MAP, 1996 U.S. Dist. LEXIS 3860, at *4-7 (D. Mass. March 8, 1996).

The court first notes that defendants do not object to responding to requests addressing the issue of whether certain documents fall within the business records exception. See Defendants' Reply Memorandum in Support of Motion for a Protective Order and Memorandum in Opposition to Plaintiffs' Motion to Compel [Requests for Admissions] (hereinafter "Defs' Reply"), at 1. Instead, they object to the sheer volume of documents at issue here, in addition to the compound nature of this request.

Defendants are correct that both requests incorporate a large number of documents and, thus, require an unusually large number of responses. However, looking beyond the sheer number of documents at issue, the court questions whether the first request does indeed impose an undue burden on defendants. Defendants assert that responding to the request will "demand a painstaking investigation" into information which "is not readily available." See Defs' Reply, at 4. Yet, Rule 36 requires only a *"reasonable"* investigation, and specifically provides an opportunity to refrain from answering or denying where "the information *known or readily obtainable* by the party is

insufficient to enable" such a response. Fed. R. Civ. P. 36(a) (emphasis added).

To the extent that a reasonable investigation fails to yield information enabling defendants to either admit or deny, defendants may express that fact in their response to the request. Defendants must, however, conduct a reasonable inquiry. Asea v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981). The extent and success of such an inquiry will, of course, vary depending on the document at issue. For example, where a document does not identify an author or recipient, contains no obvious indicia of who the author(s) or recipient(s) might be, and was written years ago, defendants may well not possess readily obtainable information so as to either admit or deny the request with respect to that particular document.[8] According to defendants, "several hundred" of the documents at issue would fall into this particular category. See Defs' Reply, at 4.

Although noting that no truly comparable cases have been offered to or identified by the court, the court agrees with plaintiffs' assertion that this particular case must be viewed differently from non-MDL cases involving large numbers of requests for admissions. See Wigler, 108 F.R.D. at 206 ("Where a case is particularly complex, a large number of requests for admissions may be justifiable.") Here, the MDL court faces the task of streamlining the eventual litigation of hundreds of lawsuits around the country. Although referring to a determination of genuineness of documents,[9] The parties here have already stipulated to the authentication of the documents produced by defendants. See CMO No. 1. a commonly cited authority indicates that requests for admission for this purpose "can be particularly useful in helping parties determine which documents that are to be introduced at trial will present foundational problems and which will not." 7 James Wm. Moore, Moore's Federal Practice § 36.10[9] (3d ed. 2002). Allowing admissions relating to the business records exception would expedite the eventual trials of numerous cases and, thus, satisfy the purposes of both Rule 36 and this MDL.[10] [10] Interestingly, plaintiffs point out that defendant Wyeth designated 919 trial exhibits in a state court trial during "the diet drug litigation" and, in that same case, responded without objection to over 500 requests to admit, many of which served to lay the foundation for trial exhibits. See Pl's Opp. and Mot. to Compel, at 14, n.10.

However, both the number of requests at issue and the fact that plaintiffs acknowledge the likelihood of additional requests does give the court pause. As such, the court suggests that plaintiffs take an additional look at the documents at issue with respect to their first request, in an attempt to determine the need for admissions with respect to all of the documents listed and in relation to the fact that additional requests appear forthcoming. The court is not ordering a reduction in the documents subject to the currently existing request per se. However, the court advises plaintiffs that good reason should exist for maintaining the list of documents as it is, and that the court may well look unfavorably upon an increase in the total number of

documents subject to requests for admission by these defendants.
In sum, the court denies defendants' request for a protective order with respect to plaintiffs' first request for admission. The court grants plaintiffs ten (10) days from the date of this order in which to submit to defendants either the current or a revised list of documents subject to the first request for admission. Given the scope of this request, the court grants defendants sixty (60) days in which to respond.

2. Plaintiffs' Second Request for Admission:
Plaintiffs' second request seeks a determination as to whether the defendants had imputed knowledge, through their employees, of the documents at issue at or near the time of their creation or receipt by the defendant. In this respect, plaintiffs seek to establish that defendants had notice of the contents of these documents where the factual predicates for admission under Rule 803(6) may not be established.
Defendants argue that this request improperly seeks to compel the admission of a legal conclusion. See generally 8A Federal Practice and Procedure § 2255 (observing that Rule 36(a) "does not allow a request for admission of a pure matter of law"). Specifically, defendants argue that the imputation of knowledge to a principal through its employees is a pure question of law. See, e.g., Lanchile Airlines v. Connecticut Gen. Life Ins. Co., 759 F. Supp. 811, 814 (S.D. Fla. 1991) (concluding that "[c]ircumstances where knowledge may be imputed typically involve questions of law rather than fact."); 58 Am. Jur. 2d Notice § 8 (1989) (observing that "constructive notice is a legal fiction, which is imputed or implied by the law primarily for the promotion of sound policy.") In response, plaintiffs assert that this request falls within the ambit of Rule 36 as an "application of law to fact". Fed. R. Civ. P. 36(a).
The 1970 Advisory Committee's Note to Rule 36 explained that:

> Not only is it difficult as a practical matter to separate "fact" from "opinion," but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In [one case, a] plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants[.] This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial.

Fed. R. Civ. P. 36(a), advisory committee's note (internal citations omitted). Generally, where a responding party considers a matter to be in dispute, "[t]he proper response [] is an answer[,] as [t]he very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial." Id.

> In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

Id.

Plaintiffs' second request appears to present a mixed question of law and fact. Therefore, to the extent defendants dispute the propriety of a request with respect to a particular document, they may indicate their objection to that request. On the other hand, where defendants are aware of facts sufficient to support either an admission or denial as to a particular document, they must answer the request accordingly.

Thus, the court also denies defendants' request for a protective order with respect to plaintiffs' second request. The parties shall abide by the schedule indicated above in re-submitting and responding to this request.

B. Plaintiffs' Motion to Compel

In response to defendants' motion, plaintiffs seek a motion to compel responses to their requests for admission. They seek the imposition of a reasonable time period for responses so as to permit, if necessary, further discovery regarding facts related to the admissibility of the identified documents.

In accordance with the above stated rulings, the court grants plaintiffs' motion to compel responses to their requests for admission. Defendants shall respond to plaintiffs' requests as directed by the schedule described above.

IV. CONCLUSION

For the reasons stated above, the court hereby DENIES defendants' request for a protective order with respect to plaintiffs' requests for admission. As such, the court hereby GRANTS plaintiffs' motion to compel responses to these requests. The parties shall abide by the schedule as provided for in this order.

DATED at Seattle, Washington this 5th day of June, 2002.

/s/

BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT JUDGE